

BOARD OF APPEALS CASE NO. 4860

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BEFORE THE

APPLICANT: Buddy R. Nicosia

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ZONING HEARING EXAMINER

**REQUEST: Variance to construct a
building within the Critical Area buffer
and non-tidal wetlands buffer in the B3
District; U. S. Route 40 and Joppa Farm
Road, Joppa**

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OF HARFORD COUNTY

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Hearing Advertised

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Aegis: 11/4/98 & 11/11/98

HEARING DATE: January 6, 1999

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Record: 11/6/98 & 11/13/98

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ZONING HEARING EXAMINER'S DECISION

The Applicant, Buddy R. Nicosia, filed an application requesting a variance from the 75 foot non-tidal wetland buffer within the Chesapeake Bay Critical Area, pursuant to Section 267-41.1(G)(4)(b)(2) and Section 267-41.1(H) of the Harford County Code. The Applicant originally requested a reduction of the 75 foot buffer to 25 feet. At the hearing, the Applicant amended the variance request and is seeking a variable width to reduce the buffer a maximum of 50 feet and a minimum of 0 feet, as shown on Applicant's Exhibit No. 6. Therefore, the Applicant is requesting a variable width buffer ranging from a minimum of 25 feet to a maximum of 75 feet.

The subject parcel is located on the northeast corner of U.S. Route 40 and Joppa Farm Road in the First Election District. The parcel is identified as Parcel No. 71, in Grid 3-F, on Tax Map 64. The parcel contains 1.0418 acres, all of which is zoned B3/CR/IDA.

Mr. Art Leonard appeared and qualified as an expert in the field of civil engineering and site planning. Mr. Leonard described the subject property as consisting of 1.041 acres with an irregular shape and commercial zoning. He said currently the property is vacant, although over a number of years it has been used for temporary uses such as Christmas tree sales and a pit beef stand. In referring to Applicant's Exhibit No. 6, the site plan, Mr. Leonard stated that the Applicant seeks approval to encroach a minimum distance into the 75 foot non-tidal buffer. He said the proposed use is for an office/retail service building, which will consist of approximately 4,000 square feet.

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Mr. Leonard indicated that he has visited the site on numerous occasions and, in his opinion, the variance requested will not have a detrimental impact on the wetland. Furthermore, he testified that he had met with the Department of Housing and Community Development, who raised a concern regarding archeological resources on the property. The Department concluded that the proposed project will not have an effect on archeological resources. Mr. Leonard identified Applicant's Exhibit No. 8, which is a letter from the Department of the Environment, which indicates that the Department has granted its initial approval for the proposed development project. Mr. Leonard, by making reference to the site plan, identified the extensive flood plain on the property and indicated that a portion of the property will be filled in order for development to occur.

Mr. Leonard further testified that the property is encumbered by the Chesapeake Bay Critical Area and he testified by referring to Exhibit No. 9 that by way of a letter from the Critical Area Commission, the Commission is supportive of the variance request. Mr. Leonard indicated that, pursuant to the Chesapeake Bay Critical Area Regulations, the 10% rule can be complied with. He said the purpose of the 10% rule is to reduce the amount of pollutants that would be generated by new development. By making reference to Applicant's Exhibit No. 13, Mr. Leonard demonstrated that, as a result of this project, pollutant loading will be decreased. The major reason for this is that a large portion of the existing site is non-vegetative and the proposed development plan will create new landscaping, which will help to reduce runoff.

Mr. Leonard stated that he was familiar with the initial Staff Report prepared by the Department of Planning and Zoning. He said the initial report expressed reservations about the variance request; however, after subsequent discussions with the Department of Planning and Zoning and their review of a new site plan, the Department now support the variance request. Mr. Leonard further explained that he is familiar with Section 267-41.1 of the variance provision of the Chesapeake Bay Critical Area. By making reference to Applicant's Exhibit No. 2, which was Mr. Leonard's written request to the Critical Area variance criteria, he concluded that the granting of the variance would not have a detrimental impact on the community, and would be consistent with sound planning practices.

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He further state that, in his expert opinion, literal enforcement of the 75 foot buffer requirement would result in an unwarranted hardship to the Applicant.

Mr. Buddy R. Nicosia, the Applicant, appeared and testified that he has been the owner of the subject parcel for a number of years and has been attempting to secure the requisite approval to build a small office/retail service building. He said that since the property is located in a flood plain and in the Chesapeake Bay Critical Area, there are various regulatory approvals that are necessary before construction can begin. Mr. Nicosia confirmed Mr. Leonard's testimony that the project has received approval from the Chesapeake Bay Critical Area Commission and the Maryland Department of the Environment.

Mr. Nicosia stated that the Department of Planning and Zoning has been encouraging him to improve his property since the property for a number of years has been used strictly for seasonal temporary uses. He said that recently Harford County has designated the Applicant's property as part of the Edgewood Enterprise Zone, which provide economic incentives for property owners to develop their commercial property.

Mr. Nicosia concluded his testimony by stating that he was of the opinion that granting the variance would not have a detrimental impact on the community and it would allow him to move forward with improving the property. He further stated that the literal enforcement of the 75 foot buffer would result in an unwarranted hardship to him in that he would be denied the right to use his property. He further stated that there are similarly situated properties on U.S. Route 40 that are in the flood plain and within the Chesapeake Bay Critical Area that have been developed. He identified one such property as the Joppatowne Shopping Center, which is located directly opposite the Nicosia property on the south side of U.S. Route 40.

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Mr. Anthony McClune, Chief of Current Planning for the Department of Planning and Zoning, appeared and testified that the initial Staff Report expressed reservations about the variance request. However, Mr. McClune said that the Department of Planning and Zoning was in full support of the amended variance request. He said that Mr. Nicosia had responded to the concerns previously expressed by the Department and the revised site plan, Applicant's Exhibit No. 6, reflects major changes from the original submission. He said the revised site plan minimized disturbance to the forested area. He also concurred with Mr. Leonard's testimony that the Chesapeake Bay Critical Area Commission was in support of the variance request.

CONCLUSION:

The three witnesses who testified all produced evidence supporting the variance request to reduce the 75 foot buffer. There was no opposition to the request and the uncontroverted testimony of the Applicant's expert is that the variance will not have a detrimental impact on the community and the literal enforcement of the 75 foot buffer requirement would result in unwarranted hardship to the Applicant.

In deciding to grant a variance from the Chesapeake Bay Critical Area, pursuant to Section 267-41.1(H) of the Harford County Code, the Hearing Examiner must consider all the elements set forth in subsections 1 through 8.

- (1) That a literal interpretation of the provisions of this section will deprive the applicant of rights commonly enjoyed by other properties in similar geographic and land use management areas within the critical area.*

Mr. Leonard testified that special features and circumstances apply to this property, which result in unwarranted hardship to the Applicant. There are as follows:

- a. The Applicant's property is located in the fringe of a 100-year flood plain.
- b. The flood plain covers approximately 91% of the total property.
- c. As a result of the construction of the 3.2 foot high jersey barrier on the center line of U.S. Route 40, the flood plain elevation on the Applicant's property was raised to 2-1/2 feet above the former flood plain elevation.

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- d. One hundred thirty-five (135) foot frontage from the west side of the property is inaccessible due to the existing guard rail along U.S. Route 40.
 - e. Due to the property's severely acute triangular shape, its close proximity to Joppa Farm Road, the existing drainage ditch, the existing storm drain pipe, the existing gravity sewer and force main, and its narrow dimension, the 345 feet of frontage from the east side property corner is for all practical purposes inaccessible.
 - f. As a result of the above, only 208 feet of frontage is suitable for access.
 - g. Even within the 208 feet of accessible frontage, no building area is usable due to the restrictive nature of the buffer.
 - h. The above geometric, manmade and natural features leave only .30 acres or 29% of the property for placement of the building and additional driveway and parking areas.
 - i. The Applicant is required to construct the building's finished floor elevation a minimum of 1 foot above the 100-year floor plain elevation.
 - j. Directly opposite the subject property is a similarly situated property, which is fully developed as the Joppatowne Shopping Center. That site is within the Chesapeake Bay Critical Area and has the same Critical Area Designation. It also has similar floor plain issues and the site is a fully developed commercial property.
- (2) *That the granting of a variance will not confer upon the applicant any special privilege that would be denied by this section to other lands or structures within the critical area.*

The testimony of the expert indicated that, taking into consideration the previously described special features and circumstances, the Applicant has submitted a site plan that is sensitive to the natural feature of the site. The Applicant does not, in any way, presume special privileges would be gained if the variance request was approved. The land area proposed for development, as illustrated on the site plan (Applicant's Exhibit No. 6), is entirely within the existing open area, which has been used for a wide range of temporary commercial uses over the past two decades.

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- (3) *That the variance request is not based upon conditions or circumstances which are the result of actions by the applicant, nor does the request arise from any condition relating to land or building use, either permitted or nonconforming, on any neighboring property.*

No action by the Applicant has resulted in the need for this variance request. This request did not arise from any condition of land or building use (permitted or non-conforming on any neighboring lot.

- (4) *That the granting of a variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the critical area, and the granting of the variance will be in harmony with the purpose and intent of this section.*

The Applicant's expert, Mr. Leonard, testified that water quality control and storm water management will be provided on site. Site design features will accommodate the 10% pollution reduction requirements. Underground pipes will be used for extended detention to accomplish the required 10% pollution reduction requirements. In addition to the extended detention, the existing and pervious gravel lot on site will be removed and replaced with vegetative cover. The gravel area within the U.S. Route 40 right-of-way will be removed and replaced with vegetative cover. Substantial pollutant reduction levels will be achieved as a result of the proposed improvements.

- (5) *That all identified habitat protection areas on or adjacent to the site have been protected by the proposed development and implementation of either on-site or off-site programs.*

By not disturbing the existing forest buffer, on-site habitat protection areas will be protected. Ten percent (10%) pollution reduction requirements will be met.

- (6) *That the growth allocation for the county will not be exceeded by the granting of the variance.*

This provision is not applicable in the subject case.

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- (7) *That the variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Part 1 or the public interest.***

The granting of the variance will result in an improvement to the existing property. Other similar situated properties along U.S. Route 40 have similar characteristics as the subject site and have been allowed to develop for commercial uses. Therefore, the Applicant maintains that the variance will not be substantially detrimental to adjacent properties and will not materially impair the purpose of the Zoning Code or the public interest. Furthermore, the Department of Planning & Zoning, the Chesapeake Bay Critical Area Commission, the Department of Housing and Community Development, and the Maryland Department of the Environment have all endorsed the proposed use of this property.

- (8) *All applications for variance requests shall be filed in writing in accordance with Section 267-9(D) of the Zoning Code. Notice of all variance requests and copies of applications filed in accordance with this section shall be sent to the Chesapeake Bay Critical Area Commission within ten (10) working days of filing with the Department of Planning and Zoning. A copy of the recommendation of the hearing examiner or of the Board in acting on the variance shall be promptly sent to the Commission.***

The Department of Planning and Zoning forwarded the application for the variance to the Chesapeake Bay Critical Area Commission and the Commission responded with a favorable recommendation.

Therefore, it is the recommendation of the Hearing Examiner that the requested variance for a variable width buffer, as shown on Applicant's Exhibit No. 6, which will result in a variable width buffer from the non-tidal wetland ranging from a minimum of 25 feet to a maximum of 75 feet be approved.

Date **MARCH 8, 1999**

**L. A. Hinderhofer
Zoning Hearing Examiner**